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LOS ANGELES BAR BULLETIN

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In This Issue

The President's Page	F. Augustus Mack, Jr.	321
District Attorney's Discretion Not to Prosecute . .	Richard Klein	323
Subpoenas for Hospital Records	James E. Ludlam	335
Jury Service	Lee Nichols	343
Silver Memories	A. Stevens Halsted, Jr.	349
Brothers-In-Law	George Harnagel, Jr.	351
Letters to the Editor		352

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The President's Page

By AUGUSTUS F. MACK, JR.
President, Los Angeles Bar Association



J. Louis Elkins

J. Louis Elkins retired September 1, 1957 after thirty years as Executive Secretary of the Los Angeles Bar Association. It is fitting this month that Lou have the spotlight—something which, with characteristic modesty, he ever avoided.

When he first assumed his duties, the Los Angeles Bar Association was comparatively small and unknown. Lou surveyed and analyzed the situation, in his quiet and effective manner began making constructive suggestions when asked for them by the various officers and trustees along the way. In the early '30s when the depression rolled across the land, Lou went so far as to defer taking his salary for months at a time in order that other pressing bills might be paid and the doors remain open. *The Association always came first.*

You know the rest. Today the Los Angeles Bar Association is the third largest local bar association in the country. It has emerged as an organization of action, accomplishment, integrity and prestige. It has achieved many "firsts" during Lou's regime, notably the Lawyers Reference Service, widely copied and used everywhere

in communities of sufficient size to warrant its use; arbitration of fee disputes by an Arbitration Committee; plebecites on candidates for judicial office; representation of indigents in the Federal Court by the always hard working and overloaded Federal Criminal Courts Indigent Defense Committee.

More than anyone else, Lou Elkins is responsible for the splendid standing and stature of the Association among the bench and bar of the United States today. He is likewise responsible for its being ever alert to changing conditions in an area of electrifying growth and the constant effort to serve the bar and the public well.

It is seldom in any organization that one man captures the esteem and affection of all. The voices of a few dissenters may generally be heard, but the exception proves the rule. Lou Elkins doesn't have a single enemy in the world, has always enjoyed—and always will—the complete confidence and high esteem of all our members and all who know him.

Thank you, Lou, for a job superbly done. You retire with our grateful appreciation and affection. Enjoy yourself doing things as you wish, come see us when you can. Thank you for always just being you.

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District Attorney's Discretion Not to Prosecute

By RICHARD KLEIN*

"How does the District Attorney decide what felony cases to prosecute?" Questions like this arise in the minds of both lay persons and lawyers. More accurately stated the question is "How does the District Attorney exercise his discretion not to prosecute a felony case?" In Los Angeles County¹ where the elected District Attorney and his staff of 101 attorneys must conduct prosecutions of public offenses on behalf of the over 5 million county residents and where there are 15,000 felony prosecutions each year,² this is a significant inquiry.

First of all, it must be made clear that the District Attorney does have this discretion. Discretion is not specifically mentioned in the California codes,³ but it is a practical reality in the daily performance of the prosecutor's duties. In *People v. Johnson*,⁴ the California District Court of Appeal recognized this discretion by stating: "In other words, while it is the sworn duty of a district attorney to fairly and impartially prosecute persons accused of crime, and to protect as well the individual rights of an accused person as those of the whole people, whose laws he is specifically enjoined to uphold and maintain, yet there is, and must be, committed to his judgment many matters of *discretion* in the discharge of his duties as a public official." Other California decisions are in accord.⁵

How are felony prosecutions processed? The answer to this preliminary question should provide an adequate background for the reader who is unfamiliar with law enforcement practices and techniques in Los Angeles County.

PROSECUTION PROCESS

Criminal cases submitted to the District Attorney for possible

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¹In addition to the main office located in the Hall of Justice in downtown Los Angeles, the Los Angeles District Attorney has three branch offices (Long Beach, Pasadena, Santa Monica) and nine area offices (Compton, East Los Angeles, El Monte, Glendale, Huntington Park, Inglewood, South Bay, South Gate, Van Nuys). This paper will deal only with felony cases submitted to the Main Office which covers the City of Los Angeles.

²Based on a Record Division report for the fiscal year 1956-57.

³Govt. C 26500-26502.

⁴13 Cal. App. 776, 780, 110 Pac. 965, 966.

⁵Pearson v. Reed, 6 Cal. App. 2d 277, 286, 44 Pac. 2d 592, 596-597; White v. Brinkman, 23 Cal. App. 2d 307, 313-314, 73 Pac. 2d 254, 257.

felony prosecution normally are presented by a law enforcement officer.⁶ For this reason, the case is already investigated so that all facts essential to prosecution are available for the District Attorney. The first attorney to consider a criminal case for the office is a deputy district attorney assigned to the Complaint Division.⁷ It is the complaint deputy's duty to evaluate the facts and decide whether or not there is probable cause for a felony prosecution. If so, the complaint deputy prepares a felony complaint for the signature of the complaining witness.⁸ He also dictates a statement of facts which is a summation of the testimony of each witness for the People and any incidental notes or comments necessary for adequate presentation of the case in municipal court. If the deputy decides against the issuance of a complaint, he writes a formal opinion⁹ stating his reasons for rejection. In refusing a felony complaint, the complaint deputy may refer the case to the City Attorney for misdemeanor consideration.¹⁰

After the issuance of a complaint, the defendant is arraigned in municipal court and a date is set for the preliminary hearing.¹¹ Meanwhile, the District Attorney's clerical force assembles the case file which includes a copy of the complaint, all related police reports, the statement of the case which the complaint deputy filled out for the drafting of the complaint, and the statement of facts. This file is given to the deputy who puts on the preliminary hearing in municipal court.¹² In this proceeding, the burden of establishing a *prima facie* case is imposed on the People,¹³ and not the more stringent beyond-a-reasonable-doubt test. After the completion of the hearing, the committing magistrate determines whether or not

⁶Office policy requires a citizen to make his initial complaint of a possible crime to a local police officer or a deputy sheriff. In certain situations, usually corporate securities or business fraud cases, an investigator from the District Attorney's Bureau of Investigation may present a case for the complainant.

⁷There are nine deputies assigned to the Complaint Division who work under the Division Chief.

⁸Generally, the complaining witness who swears to the complaint is the police officer or deputy sheriff in charge of investigating and presenting the case in question. Under some circumstances, such as where a victim may have a change of heart or where the officer is unwilling to assume the responsibility of initiating the prosecution, a victim may be requested to sign the complaint.

⁹These formal opinions are titled "Opinion as to Deficient or Defective Evidence in Application for Complaint." Opinions are kept on file by the District Attorney, and a copy is given to requesting officer for his use in terminating the case.

¹⁰The Los Angeles City Attorney handles all misdemeanors committed within the City of Los Angeles, while the District Attorney is charged with the responsibility of prosecuting felonies.

¹¹PenC 859-863.

¹²Eight deputies are assigned to the Preliminary Hearing Division, and these men present the People's case before the committing magistrate. There is a caseload of about 15 preliminaries each morning calendar and each afternoon.

¹³PenC 871-872.

the defendant is to be held to answer for trial in the superior court.¹⁴ If the case is dismissed by the court, prosecution ceases. However, it should be pointed out that there is no jeopardy at a preliminary hearing and the District Attorney has the discretion to refile the case. After the municipal court proceedings, the preliminary deputy dictates his memorandum of the preliminary hearing which is a summation of the testimony elicited from the witnesses supplemented by explanatory notes. This memo is added to the case file, and is used as a guide for the drawing of the information¹⁵ and for trial preparation by another deputy.

Two weeks after the defendant is held to answer, he is arraigned in superior court before the master criminal calendar judge.¹⁶ It is at this stage that the defendant enters his plea to the charges alleged in the information.¹⁷ In some instances, the defendant may move for a dismissal based on the insufficiency of the evidence produced at the preliminary hearing¹⁸ and the master calendar judge must decide this motion. If a 995 motion is granted, the District Attorney may appeal the decision. If a trial is necessitated by a not guilty plea, the case is assigned to one of the criminal trial courts.¹⁹ Three trial deputies are assigned to each court. They are charged with the task of presenting the People's cases to the court or jury.

Prosecution, of course, may proceed along an alternative route.²⁰ Certain cases are presented to the grand jury rather than the Complaint Division of the District Attorney's office.²¹ If this is done, the grand jury determines whether or not to return an indictment.²² After being indicted, a defendant is arraigned in superior court and then tried on the alleged charges, depending upon his plea.

COMPLAINT DECISION

The complaint deputy's decision whether or not to issue a felony

¹⁴The defense strategy at a preliminary hearing usually dictates that no defense be offered, but an attempt is made to prevent the People from proving a *prima facie* case. The committing magistrate does not weigh any conflict in the evidence. On the other hand, the District Attorney tries to present a complete case so that there will be an adequate transcript for submission to the trial judge in superior court.

¹⁵GovtC 26502, PenC 949-951.

¹⁶PenC 976, 977, 988.

¹⁷PenC 1016.

¹⁸PenC 995.

¹⁹There are seven departments of the Los Angeles Superior Court that are designated as criminal trial courts in addition to the master criminal calendar department. ²⁰PenC 915-925 provide for grand jury indictment as a method of prosecuting a felony as well as the more modern information drawn by the District Attorney after a preliminary hearing.

²¹The choice depends upon many factors. Initially, the complaining party may go directly to the grand jury. The investigating officers or the District Attorney may prefer that the case be submitted to the grand jury. Such cases are often ones involving political overtones or great public interest. In any event, the grand jury has the final say whether or not to hear a criminal case.

²²PenC 940.

complaint is the most frequent, and perhaps most important, exercise of discretion by the District Attorney. The complaint-filing decision is the chief sifting-out process in the prosecution of felony cases. Each month about 1000 cases are submitted to the Complaint Division for issuance of a felony complaint, and each month approximately twenty-five per cent of these requests are rejected and twenty-five per cent are referred for misdemeanor consideration.²³

Deputies assigned to the Complaint Division are instructed simply to apply the law to the facts presented and then to make a lawyer-like decision. Complaint Division deputies decide an average of seven cases a day each in addition to other duties. The investigating officer who brings the case to the office is assigned at random to one of the complaint deputies.²⁴ In presenting the case, the officer hands to the deputy copies of the regular police reports—the Crime Report and Arrest Report, plus evidence reports, follow-ups, stenographic statements, and any necessary documents required in a particular case. These police forms contain vital statistics on the victim, suspect, and witnesses, as well as the reporting party's and officer's account of the actionable facts and any statements made by the suspect at the time of arrest. Based on this summarization of the case, the complaint deputy makes his decision as to whether or not all the elements of the *corpus delicti* are present and whether or not the suspect is sufficiently connected up to the crime.

In many cases, the complaint deputy finds it necessary to interview key witnesses before making his decision. This is particularly true in sex offenses—crime against child,²⁵ statutory rape,²⁶ and forcible rape.²⁷ It is also important in assaults involving husband and wife²⁸ and other family relationships. In crime against child cases, the victim is often very young in years, and the deputy employs the interview technique to determine whether the child can qualify as a witness. Once again, it is apparent that the District Attorney is exercising discretion quite similar in nature to the court at a later stage in the proceedings. In either rape situation, the deputy must attempt to ascertain whether the offense actually occurred, since such charges are easily feigned and often are lodged

²³Based on statistics kept by the Complaint Division of the Los Angeles District Attorney's office.

²⁴Assignment is based primarily on availability of the complaint deputies. An availability light system is employed for this purpose.

²⁵PenC 288.

²⁶PenC 261.1.

²⁷PenC 261.3.

²⁸PenC 273d, in addition to PenC 245.

for motives far-removed from the field of criminal prosecution. Also, there is always a serious question whether or not the victim of a rape is willing to proceed with prosecution. If not, the crime is often impossible to prove because there are rarely third-party witnesses to the act. Frequently, the same situation exists in husband-wife assault cases. Here again, the District Attorney's experience is that felony prosecutions are often impossible with a reluctant victim. This problem demands that the issuing deputy thoroughly sound out the victim's attitude toward prosecution and also the formulation of a general policy requiring such victims to sign the complaints as complaining witnesses.

In all other types of cases, the investigating officers will bring reluctant or unreliable victims to the District Attorney's office so that they may be interviewed by the complaint deputy. There are certain cases that could be successfully prosecuted without the victim's testimony, but the problem of who will sign the complaint then arises. The law enforcement officer in charge of the case ordinarily signs as the complaining witness. In situations where the victim refuses to assist in the People's case, the officer may decide against signing the complaint. There is then no signer to the complaint because the District Attorney and his deputies do not sign as complaining witness in any situation. Where the victim insists on not pressing charges, the deputy prepares a refusal form for the victim to sign.²⁹

As pointed out earlier, 25 per cent of cases submitted to the District Attorney for felony prosecutions are refused. In each of the cases rejected, the District Attorney is exercising his discretion not to prosecute. Certain reasons for exercising this discretion have become standardized through continuous repetition in the formal opinions. These reasons fall into four general categories—Evidence Insufficient or Unavailable, No Signator to the Complaint, Valid Defense Inherent in Facts, and Interests of Justice.³⁰ Every refusal of a felony complaint can be classified in one of these four categories.

Each general category consists of sub-categories which point up the existing legal deficiency more specifically. Under the heading Evidence Insufficient or Unavailable, there are the No Felony Committed, No Connecting Evidence, Evidence Unavailable, and

²⁹"Complaint Refusal at Victim's Request" is the name of the form, and it is kept on file with the formal opinion.

³⁰These categories are used in computing the monthly statistics of formal opinions in the Complaint Division.

Case Too Weak sub-classifications. The term No Felony Committed connotes those situations where no crime at all has been committed, or, at most, the facts amount to a misdemeanor. For illustration, Suspect, found sitting on front porch of Victim's apartment, stated he was looking for a friend who lived in the apartment building, but was arrested anyhow because of reports that Suspect had been climbing on the fire-escape. Suspect was drunk at time of arrest and investigation disclosed Suspect did have a friend living in the building. This burglary case was submitted to the Complaint Division, and was dismissed for lack of intent. Arrest for a crime against child was based on conclusions made by a witness, the reporting party. Arresting officers did not question witnesses, but investigation later determined no improper touching and no reason for the arrest. Often burglary reports are taken and arrests made on a factual situation involving shoplifting in a public store. There is no way to prove intent at time of entry and so there is no burglary on the facts. If the amount taken is under \$200,³¹ and it usually is, then there is no felony, unless there is a sufficient prior for a petty theft with a prior petty theft³² or prior felony.³³ Similarly many thefts are submitted as felonies where the value is under \$200 and there is no sufficient prior, and the case merely represents a misdemeanor petty theft.³⁴

Opinions based on No Connecting Evidence refer to cases involving suspects who cannot be connected to the crime that has been committed. In other words, there may be no evidence at all to connect up the suspect or the potential identification witness may not be positive in identifying the suspect or finally the wrong man may be in custody. This situation occurs quite frequently in narcotic and burglary offenses. A very typical example is a possession of narcotics³⁵ case involving two or more arrestees and the narcotic is found on the person of only one. Under such facts, there could be joint possession, but there may be no way to tie in the suspect who did not actually possess the narcotic and who denies knowledge. In a homicide, an elderly woman was assaulted in her Main Street room and died two months later. Victim died without regaining consciousness and so never identified her attacker. Suspect, who

³¹PenC 487.1.

³²PenC 666.

³³PenC 667.

³⁴PenC 484, 486, 488.

³⁵H&SC 11500.

was discovered in the hotel washroom washing his hands soon after the approximated time of the beating, consistently denied the assault. Even though Suspect had a bad reputation for violence in the area, there was no physical evidence to connect the Suspect. A young Victim was beaten up by a gang of youths and fled from the scene, leaving his car. Later, Victim, accompanied by his parents, returned to recover his car and was shot at by the youths. Eleven Suspects were arrested, but Victim could identify only two and only these two were filed on.

Evidence Unavailable indicates just what the name implies—essential evidence is unobtainable either legally or factually. Discretion is exercised in this category where it is felt that a witness cannot qualify or a witness is not present for court or a prior commitment cannot be secured. Certain testimony may be unavailable because of privilege or evidentiary rules or evidence may be inadmissible because of an illegal search and seizure under the *Cahan* rule.³⁶ Victim met Suspect-One in a bar and took her home. While seated in his car, Victim was robbed at knifepoint by two male Suspects. Victim could not identify either male Suspect, and there were no admissions. The only connecting link was the 16-year-old female Suspect, who was an accomplice. Since there was no corroboration for the accomplice's testimony, the evidence was legally insufficient for a conviction.³⁷ In a narcotic possession case, the amount of narcotics recovered was so small that a police chemist could not testify in court.

A broader exercise of discretion occurs whenever the Case Too Weak reason is assigned for a refusal. Such situations as mutual combat, lack of credibility, injuries too slight, and delay in reporting crime are included in Case Too Weak. Mutual combat covers assaults where both parties are actively engaged and where neither takes undue advantage. A large number of cases fall into this group. If the victim or key witness is a prostitute, thief, ex-convict, or disreputable person, or there is a serious conflict in stories and it would appear the victim is lying, then there is lack of credibility and Case Too Weak reason is assigned to the District Attorney's exercise of discretion. A homicide that was considered Case Too Weak involved a fight in a bar between two men, both of whom had been drinking. Only one witness stated Suspect struck Victim,

³⁶*People v. Cahan*, 44 Cal. 2d 434, 282 Pac. 2d 905, adopted the exclusionary rule.

³⁷PenC 1111.

but Victim's face showed no marks indicating a blow. Deceased did strike Suspect in the mouth, and this was confirmed by physical examination of both parties. Cause of death was a fractured skull caused by deceased's head striking the ground; but because there was a conflict as to whether Suspect struck deceased, there was insufficient evidence to show Suspect caused the fall. In another case, Victim's son lived with Victim until four days prior to the alleged burglary, which was a forced entry and removal of property from the family house. But because of the relationship and surrounding circumstances of Suspect speaking to a neighbor at time of entry, the complaint deputy felt that the intent to commit theft element was too weak for superior court consideration.

The second major category of reasons not to prosecute is No Signator to Complaint. There are four situations under this heading: Victim Cannot Be Located, Victim Failed to Appear, Victim Signed Refusal Form, and Victim Signed Police Report. The victim of a crime may want to avoid implication in a lawsuit for one of a myriad of reasons. If so, he may give a fictitious address to the police, or move, or even leave town. A reluctant victim may refuse

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to give any information in the first instance or may not keep an appointment with officers or fail to come to the District Attorney's office to commence prosecution. Even after an interview with a complaint deputy, a victim could insist on not proceeding by signing a refusal to prosecute form. A variation of the latter is when the uncoöperative victim signs one of the police reports, indicating his desire not to press charges. In all of these situations, the victim has indicated his unwillingness to proceed. Thus, there is no one to sign the complaint as complaining witness, unless an officer is willing to sign. In an October, 1956, case, Victims reported to police a cutting by a certain described Suspect at 3:20 a.m. Suspect, who had a large black-handled straight razor in his pocket, was found loitering in the same area at 6:30 a.m. Suspect gave conflicting statements as to the razor and his presence in the area, but officers could not locate Victims again. In another assault with a deadly weapon case, Suspect accused Victim, his son, of indiscretions with witness, his wife and Victim's stepmother. There was a fist fight, and Suspect pointed a gun at Victim. Victim, who told his stepmother he did not want to prosecute Suspect who had eight children to support, failed to show up and come to the District Attorney's office with the investigating officers. A statutory rape situation involved Victim, 15, and Suspect, 19, both of whom admit intercourse. Victim did not want to testify against Suspect nor did Victim's father want her to do so. Father signed a refusal form, indicating his desire not to prosecute. In a robbery, the victim, an older person, not too well and rather feeble, signed the Crime Report, stating he did not want to press charges, and the deputy stated that the case was no good without the Victim's help.

Whenever the facts presented in a case disclose a valid legal defense, the complaint deputy refuses to issue a complaint on the theory that a conviction cannot be obtained. This is the Valid Defense Inherent in Facts reason for not prosecuting. It is infrequently employed in rejecting a case, because ordinarily there is some dispute as to the validity of the defense.

The broadest discretionary power is exercised in the Interests of Justice cases. In these situations, the deputy feels that for some reason it would be more just not to issue a felony complaint. In Interests of Justice cases there is frequently a defect which involves less discretion and is the reason for rejection. Thus, the Interests of Justice discretion is not exercised too often by the complaint

deputies. Perhaps, the best way to illustrate the Interests of Justice category is with some actual cases. Suspect, a businessman from Mexico with no criminal record, was arrested with three other men after officers observed them acting suspiciously in the vicinity of a liquor store. Suspect had a small pistol on his person,³⁸ but explained that he did not know the illegality of the act and that he was carrying a lot of money on his person. No complaint issued. In a statutory rape case, Victim, 17, and Suspect, 18, wanted to get married, and the parents did not object. This is a rather typical situation, and such cases are frequently rejected in the Interests of Justice. In a petty theft with a prior petty theft case, Suspect committed a theft of a \$5 book while drunk. The prior taking was of a very minor amount, and so the deputy felt that the total picture did not represent a felony. Often where priors are old or the amount of the theft is small, the crime will be treated as a misdemeanor and referred to the City Attorney. Another arrestee violated 48OVC by failing to give proper identification, but no complaint was issued because arrestee was 71 years old and he tried to render aid. Finally, another common Interests of Justice case occurs where Suspect is being tried in federal court on a similar charge based on the same set of facts.

OPINIONS AS TO DEFICIENT OR DEFECTIVE EVIDENCE IN APPLICATION FOR COMPLAINT

(Period of study — October, 1956)

		Total			
		No.	%	No.	%
I. Evidence Insufficient or Unavailable		375	77.32		
A. No Felony Committed.....	133	27.42			
B. No Connecting Evidence.....	115	23.71			
C. Evidence Unavailable.....	19	3.92			
D. Case Too Weak.....	108	22.27			
II. No Signature to Complaint		107	22.06		
A. Victim Cannot Be Located.....	24	4.95			
B. Victim Failed to Appear.....	11	2.27			
C. Victim Signed Refusal Form.....	27	5.56			
D. Victim Signed Police Report.....	45	9.28			

³⁸PenC 12021.

III. Valid Defense Inherent in Facts.....	2	0.41
A. Justification.....	1	0.21
B. Excuse.....	1	0.21
IV. Interests of Justice.....	1	0.21

Of the cases rejected each month, about one-half fall into the No Felony Committed and No Connecting Evidence categories. This means that in 25 per cent of all cases submitted to the District Attorney for a felony complaint either no crime, or at least no felony, was committed or that the suspect in question cannot be sufficiently connected up to the crime.

Case Too Weak category accounts for 20 to 25% of all refusals each month. All these cases involve felony offenses, and are properly presented to the District Attorney for the issuance of a complaint. In each instance, there is some weakness, such as mutual combat, lack of credibility, or minor injury, which would prevent a conviction in superior court.

Another problem raised by the monthly statistics is the No Signator to Complaint category. The number of cases falling in this heading varies from 15% to over 20% of refusals each month. The significant inquiry is whether these cases should be filed. If the victim is not available for court and his testimony is necessary to establish the corpus delicti, then the case cannot be filed in any situation. The questionable case arises where the victim is uncooperative or even refuses to proceed. Based on past experience of victims committing perjury or merely stating they cannot remember when on the stand, officers usually refuse to sign as complainant when the victim is reluctant. Officers naturally want to avoid being open to a civil lawsuit if probable cause cannot be shown in a criminal case.

OTHER AREAS OF DISCRETION

Once a complaint is issued, the exercise of discretion not to prosecute diminishes considerably. First of all, the California legislature abolished "nolle prosequi" proceedings in 1872.³⁹ The law now requires that each dismissal of a criminal prosecution be made by the judge handling the particular case.⁴⁰ In other words, the District Attorney, on his own, cannot dismiss a felony case.

The general rule is that discretion not to prosecute is not exercised after a complaint is issued and prior to arraignment in superior court.⁴¹ This means that once a complaint is issued by a complaint

³⁹PenC 1386.

⁴⁰PenC 1385.

⁴¹This statement refers to the policy of the Main Office only. Procedures as to accepting pleas vary in the branch and area offices.

deputy, the case will be prosecuted to the fullest extent through the preliminary hearing stage. The only discretion is that of the committing magistrate who determines whether or not to hold the defendant to answer to the charges alleged in the complaint. Of course, the deputy putting on the preliminary hearing may move for a dismissal in a situation where proof of the offense is unavailable or non-existent.

At arraignment and then up to the time the superior court trial commences, the defendant may attempt to enter a plea of guilty to fewer counts than alleged in the information or a plea of guilty to a lesser offense. If so, the District Attorney must decide whether or not to accept such a compromise plea. By accepting a plea, the District Attorney exercises his power of discretion and decides not to press prosecution to its fullest.

CONCLUSION

It is clear from the foregoing analysis that the District Attorney has the discretion not to prosecute criminal cases and exercises this discretion frequently. This discretionary power is essential to the discharge of his duties. Some cases may fall within the purview of a Penal Code section, but are not prosecutable crimes. As a public official, the District Attorney must consider the interests of justice in determining whether or not to undertake a criminal prosecution. In many cases, there is inadequate evidence for court presentation. As a lawyer, the District Attorney must evaluate the evidence available to him in each case. By so doing, he exercises a discretion not to prosecute cases which cannot be prosecuted successfully. Finally, this discretion is not arbitrary, but is in the nature of a judicial discretion which facilitates the proper administration of justice.

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Subpoenas for Hospital Records

By JAMES E. LUDLAM*

The complaint of a witness that compliance with a subpoena is inconvenient is not ordinarily a matter designed to excite the sympathy of a lawyer. The obligation to give testimony in court is basic to Anglo-American law, and those who come, as we do, to register a small complaint against the effect of this accepted obligation must necessarily speak cautiously.

There are some institutions in every community which are, by reason of their business, a stakeholder of records. The institution is most likely to be a hospital or a bank, although there are other types of businesses that make records in the ordinary course of business which have a high probability of becoming evidence in someone else's law suit on some future date. Since the author of this article is general counsel for the California Hospital Association, it is not surprising that the discussion herein centers around hospitals.

Let it be made clear at the beginning that we do not speak herein of subpoenas which are issued in connection with a suit in which the hospital is a party. We are concerned only with the cases where the records of the hospital become involved in an action between a former patient (or his successor in interest) and some other person. Typically, this action is one for personal injuries, which almost always involves a subpoena of a hospital record. The record is frequently involved in other kinds of litigation as well, e.g., will contests.

The average hospital of 125 beds or so is likely to receive 50 or more subpoenas in the course of a year. If the hospital is in a suburban area, it is likely that each subpoena will take more than five hours of an employee's time in travel, testimony and the inevitable waiting prior to testimony. For all practical purposes, the loss of one employee day per subpoena is not an unrealistic estimate when the total time, including the copying of the record and other administrative tasks, is considered. The cost in time, trouble and money to the hospitals in California is substantial

*Member of the Los Angeles Bar Association and the State Bar of California. A.B. Stanford University, 1936; LL.B. Harvard Law School, 1939.

and could perhaps be avoided without making the task of the attorney any more difficult. It is likely that a solution of the kind outlined below could materially ease the burden for attorneys as well as hospitals.

There are few lawyers who ever need more than the record itself when they issue a subpoena re deposition or re trial for hospital records. So long as the record or a reliable copy is delivered to the attorney, the presence of a hospital employee at the deposition or in the courtroom is not, as a practical matter, necessary if the record is admissible in evidence without the usual testimony necessary to qualify it under the Business Records as Evidence Act, CCP §1953 (e-h). There are few instances where the authenticity of a hospital record is questioned in a legal proceeding which does not involve the hospital. The author cannot recall a single instance where the testimony of the person who had custody of the record would have contributed significantly to the proceeding, other than to lay a proper foundation for the admission of all or a part of the record into evidence.

In short, the hospital is a stakeholder insofar as law suits in which it is not a party are concerned, and the cost of being a stakeholder is relatively large when viewed in relation to the usefulness of the expenditure.

A number of means of eliminating this expenditure without prejudicing the interests of lawyers have been tried by hospital organizations over the last several years. Three general approaches have been used in their search for a solution to this problem, none of which have been particularly successful to date.

The first approach was to attempt to secure the voluntary cooperation of the Bar. Counsel for the hospitals have developed a form stipulation which is used in many cases by hospital personnel. The stipulation provides that a copy of the record may be introduced in the place of the original, that the record may be introduced as though a proper foundation were laid and that the copy will be returned to the hospital when no longer needed for the proceeding. With such a stipulation in hand, the hospital employee will leave the record with the clerk of court or the attorney who issued the subpoena. Procuring the stipulation often takes considerable time, and some attorneys are reluctant to sign it (often, we are sure, because the hospital employee does not have sufficient experience to be able to explain the need for it in a persuasive

way). The stipulation procedure has not proved to be a significant answer to the problem. The hospital organizations had some hope that the 1955 amendment to CCP §2021 (8), authorizing the taking of the depositions of the custodian of hospital records, would alleviate the problem, because a deposition can be arranged more informally and at more convenient times. It was felt that the deposition might eliminate the great bulk of court appearances. The contrary result seems to have occurred. Not only does the hospital now get two subpoenas in every case that goes to trial (one for the deposition and another for the trial) but the subpoena re deposition often designates an hour in the late afternoon or early evening, or a Saturday. (The attorneys issuing these subpoenas are obviously very busy men). Since most hospital record room personnel are women, and subject to the eight-hour law (Labor Code §1350), their work schedule must be altered to allow them to comply with the subpoena and work only eight hours. Requiring an employee who ordinarily works Monday through Friday to come in on Saturday to answer the subpoena presents some personnel problems as well.

We have had some success in persuading attorneys to schedule depositions at the hospital itself and during normal working hours, but there are just too many attorneys to talk with, and even the most cooperative man may be hard pressed for time and not be able to comply. The solution of voluntary cooperation within the framework of existing subpoena practice seems unworkable, at least over the long term, because of the inability of the hospitals to reach and convince enough attorneys to make this approach workable. Until a legislative solution can be found, however, the area of voluntary cooperation is the only available avenue of amelioration of the difficulty, and it is to be hoped that both hospitals and the Bar will continue to cooperate whenever possible to ease the burden of the subpoenas.

The second approach which was investigated concerned a possible amendment to the rules of court which would deem the depositing of the record with the clerk as sufficient compliance with a subpoena re trial. A number of problems appeared immediately, not the least of which was the doubtful validity of such a rule. Code of Civil Procedure, §1991, all too plainly requires personal attendance of the person subpoenaed.



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The third approach, and the only one which promises any long-term solution to the hospitals, it is an amendment to the Code of Civil Procedure authorizing a witness to mail a copy of the record as full compliance with the subpoena. A bill to achieve this result (AB 1679—Hanna) was introduced in the 1957 Legislature at the request of the California Hospital Association. In outline it provided that the hospital could mail a photostatic copy of the record to the notary in the case of a subpoena re deposition, or to the clerk, in the case of a subpoena re trial. The records were to be enclosed in a separate sealed envelope, to be opened only on order of the notary, or the judge, in the presence of all parties present. The records would be accompanied by a certificate reciting the matters necessary to lay a proper foundation for the admission of a business record into evidence, and the statements in the certificate were to be *prima facie* evidence of the truthfulness of the matters asserted.

A subpoena without a *duces tecum* clause could be issued at any time for the custodian, and a second subpoena would be issued for the original record if the attorney involved stated that the copy was unacceptable.

The bill passed the Assembly but failed in a Senate committee by one vote. It was referred to the Interim Judiciary Committee for study prior to the 1959 session. The bill will be introduced again in the 1959 session, and the hospitals are hopeful that it will pass at that time.

The bill had something of a history at the 1957 session. The proposal was submitted to the State Bar for consideration prior to the session and apparently generated or increased interest of the Bar in the particular problem discussed here. Shortly thereafter a bill (AB 2208—O'Connell) to provide an alternative method of compliance with the subpoena was introduced by the Bar itself, but it was not limited to hospitals. It embraced any "business" as that term is defined in the Business Records as Evidence Act. AB 2208 was subsequently dropped for this session after a number of technical problems were raised by various members of the State Bar committees. After amendments to AB 1679 necessary to protect any claim of privilege¹ that might be raised as to the records at the time of deposition or trial, the Bar decided not to advocate

¹C.C.P. §1881 (4).



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postponement of AB 1679 and consequently did not oppose it in Sacramento.

The principal problems with the bill were those raised by the State Bar Committee, and they may be generally described as assuring protection of the physician-patient privilege² and assuring every attorney the opportunity to secure the original record and the personal attendance of the custodian of records where either might be necessary. The bill in its final form was, we believe, satisfactory on these points.

A statute such as is proposed by the California Hospital Association is not without precedent in the United States. Connecticut adopted a similar act in 1955 (Conn. Gen. Statutes, Public Act No. 89, 1955), which provides, in part:

If any such hospital, society or corporation is served with a subpoena issued by competent authority directing the production of such hospital record in connection with any proceedings in any court, the hospital, society or corporation upon which such subpoena is served may, except where such record pertains to a mentally ill patient, deliver such record or at its option, a copy thereof to the clerk of such court. Such clerk shall give a receipt for the same, shall be responsible for the safekeeping thereof, shall not permit the same to be removed from the premises of the court and shall notify the hospital to call for the same when it is no longer needed for use in court. Any such record or copy so delivered to such clerk shall be sealed in an envelope which shall indicate the name of the patient, the name of the attorney subpoenaing the same and the title of the case referred to in the subpoena. No such record or copy shall be open to inspection by any person except upon the order of a judge of the court concerned, and any such record or copy shall at all times be subject to the order of such judge. Any and all parts of any such record or copy, if not otherwise inadmissible, shall be admitted in evidence without any preliminary testimony, if there is attached thereto the certification in affidavit form of the person in charge of the record room of the hospital or his authorized assistant indicating that such record or copy is the original record or a copy thereof. Made in the regular

²For an analysis of when the privilege attaches see *Kramer v. Policy Holder's Life Ins. Assn.*, 5 Cal.App.2d 380, 42 P.2d 665. Also *Frederick v. Federal Life Ins. Co.*, 13 Cal.App.2d 585, 57 P.2d 235; *San Francisco v. Superior Court*, 37 Cal.2d 227, 231 P.2d 26.

course of the business of the hospital and that it was the regular course of such business to make such record at the time of the transactions, occurrences or events recorded therein or within a reasonable time thereafter.

New York has had such a statute since 1915 (Civil Practice Act §412). An examination of the cases³ arising under the New York law discloses no significant problem with the procedure. No problems have appeared under the Connecticut Act, but it may be too soon to evaluate the new procedure of that state.

It is the hope of the hospitals that the interim committee study of this problem, and action at the 1959 session will produce a solution to this particularly vexatious problem. We are sure that counsel for banks and similar institutions share our hope.

³*In re Ericson's Will*, 106 N.Y.S.2d 203, concisely states the status of New York law. Also *Jaffe v. City of New York*, 94 N.Y.S.2d 60; *Villardi v. Villardi*, 107 N.Y.S.2d 342. The privilege must be asserted. *Miller v. City of New York*, 145 N.Y.S.2d 295.



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Jury Service

By LEE NICHOLS*

A few weeks ago I completed my tour of duty as a juror in the Superior Courts of Los Angeles County. As a newsman I had covered civil and criminal cases in municipal, superior and federal courts, and I thought I knew how juries worked. I discovered that I had known almost nothing about the working relationship between the jury and the court. Lawyers with whom I have discussed my jury service have indicated considerable interest in the personal discoveries made during my service. These recollections add nothing to the literature on the jury system, but as personal reflections I hope they may be of some interest to those whose professional lives are deeply affected by the results of jury deliberations.

My strongest impression is that jurors are considerably more intelligent than attorneys credit them with being. Of the three hundred jurors with whom I had contact only two failed to show the concern and dedication which was characteristic of the majority. Those two, incidentally, almost invariably were eliminated during *voir dire* examinations.

With increasingly rare exceptions, business and industrial firms in Los Angeles no longer aid their employees in escaping jury duty. As a result, the number of engineers, accountants, secretaries and scientists on the panel now nearly equals the number of housewives and retired. The effect which these busy professional people have on a jury outweighs their numbers. Their presence makes the rambling, anecdotal deliberations described by novelist Arthur Train in the Tutt series uncommon today.

As jurors wait in the assembly room they are exposed to an endless seminar on procedure, language and responsibilities they will encounter in courtrooms. These informal "classes" are conducted by fellow jurors who are in the last weeks of their service. Their instruction is characteristically accurate and relevant. The cynical and the blasé, if present, are never heard from.

As a result of basic attitudes and fundamental integrity, as well

*News Commentator for the National Broadcasting Company.

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as the formal and informal instructions, the juror reaches his first case far better prepared to discharge his duty than I had supposed.

Of all courtroom procedure the *voir dire* impressed me as being the least effective in achieving the objective sought. Questions about the jurors' ability to eliminate bias and prejudice accomplish little, mostly because jurors have no doubts about their own integrity. I think, however, a personal examination of prospective jurors can be successfully conducted. The problem is that few lawyers agree. Most attorneys whom I watched treated the *voir dire* as if it were a waste of time necessitated by some time schedule to which they were held.

Each attorney is entitled to his own view of what constitutes relevant information, but no attorney should ignore obvious indication of possible prejudice. I served on an accident case with a retired chauffeur. The attorney for the defendant had asked his occupation and had been satisfied with a reply of, "Retired." Had he inquired further he would have discovered that the man was unemployed as the result of a number of auto accidents in which he had been involved. The man was convinced that people who drove old cars were invariably poor drivers. He was also a prohibitionist. The plaintiff in the case drove a 1936 car and admitted to having had two drinks early on the evening of the accident. Eleven other jurors agreed to a modest recovery, but they could not convince the ex-chauffeur to come to an agreement.

The most common error which attorneys commit in the examination of jurors is asking "yes or no" questions. A question which elicits two minutes of monologue from a juror is worth fifteen minutes of yes-and-no questioning. I came to the conclusion that the question, "Tell us about yourself," is probably the best question that can be asked. The buffoon, the braggart and the aggressive are very apt to expose themselves in their reply to this sort of query.

Once the jury has been sworn, a new challenge faces both attorneys. It becomes their responsibility to make the jury feel it is a vital part of the proceedings. The judge, too, should contribute to this feeling of participation; a few judges do this well, but most are willing to wait till the completion of the case to deliver a few words of congratulations to the jury. Too often jurors are allowed to feel like spectators with reserved seats. The

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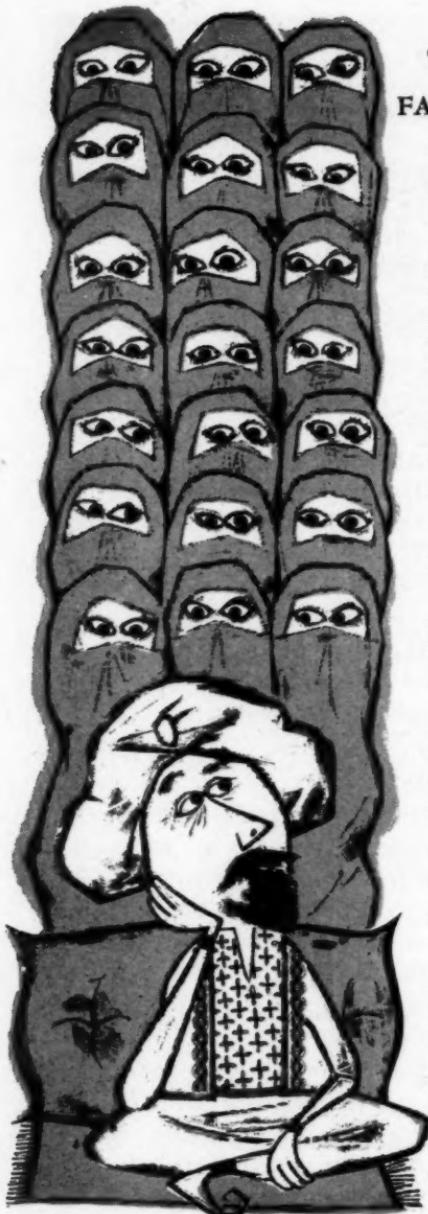
attorney who greets the jury with an invitation to participate in questioning the witnesses—and who tells them how to address their questions through the judge—he will create a favorable impression. I served on a murder trial where questions from one juror opened an area to the defense which materially affected the outcome of the case. Even if jurors' questions are repetitive, they should be considered, for jurors are, after all, the ones who must understand.

I am sure that many lawyers feel that conferences at the bench destroy the morale of the jury by making jurors feel untrusted. Such need not be the case. All judges should follow the lead of those few who explain to the jury that conferences at the bench save the time of the jury and avoid the later confusion of trying to delete testimony from their memory.

Perhaps the greatest opportunity for the attorney to aid the jury comes in the summation. However intelligent a jury may be, it needs help in planning its consideration of the testimony. This is especially true if the trial has been somewhat lengthy. Any set of facts can be studied in a variety of ways, and the attorney would do well to consider in his own mind the manner in which he would like the jury to consider the evidence and then suggest that manner to the jury.

Perhaps the two basic ways of considering testimony are (1) taking each witness in the order of appearance and (2) considering the critical events in the order of their occurrence. The choice between these two methods may very well determine the relative weight given to various testimony by the jury as well as the credibility assigned to various portions of the testimony. The method of approach chosen may determine which points of disagreement are searched out and which ones are ignored during deliberation. In complicated cases, I believe that this suggested service to the jury might well be the lawyer's most effective piece of advocacy.

I believe that all of the ills which I observed in the jury system will be corrected when lawyers and judges firmly decide that the jury is, in fact, a part of the court. When, by language, manner and method, the attorneys present their case to the jury, a big step will have been taken toward speedy and just trial by jury.



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Silver Memories

Compiled from the World Almanac and the L.A. Daily Journal of September, 1932, by A. Stevens Halsted, Jr.



A. Stevens Halsted, Jr.

The Los Angeles Bar Association's much discussed and much cussed Judiciary Plebiscite did fairly well in the August 30th election, 15 endorsees being elected at the primaries, 6 making the ticket, and only one losing out. The runs-off for State Senator list three men, **McAdoo** on the Democratic ticket, **Tubbs**, dripping wet on the Republican ticket, and **Rev. R. P. ("Bob") Shuler** on the Prohibition Party ticket. **Buron Fitts**, district attorney, came through to defeat his several opponents in an unqualified majority.

* * *

The fifth annual meeting of the California State Bar was held at Coronado at the end of September. **Guy R. Crump** was elected the sixth president, his opponent being **Hubert O. Wychoff** of Watsonville. The principal address was delivered by Dean **Henry M. Bates** of the University of Michigan Law School on the subject "Business and Government." Other notable addresses delivered were by Hon. **John H. Clarke**, former justice of the U. S. Supreme Court, **Alfred L. Bartlett**, on "Admission Problems"; **James E. Brenner** of the Stanford University Law School on "The State Bar Economic Survey of Attorneys Admitted During the Past Three Years," and Hon. **Robert M. Clarke** on "Some Suggestions to the Supreme Court."

* * *

Ten candidates are reported as being listed in the files of Governor **Rolph** for the long-pending California Supreme

Court appointment to fill the vacancy made by the death of Justice **John E. Richards** last July. The governor has stated his intention to withhold his appointment until after the November election. Candidates from this area include attorney **Frank G. Tyrrell**, Superior Court Judges **Victor R. McLucas**, **Ruben S. Schmidt**, **Albert Lee Stephens** and **Walton J. Wood**. Three Justices of the District Court of Appeal are also on the list: **Ira Thompson** and **Frederick E. Houser** of the Second District and **E. J. Marks** of the Fourth District.

* * *

Upsetting all the dopesters in the Star Bar election for the Governorships in Districts 9 and 10 (Los Angeles and environs), the local bar voted very closely on the three opposing candidates, after registering an extremely apathetic attitude. Out of approximately 5,277 voters, casting only 65% vote as against a 98% vote in San Francisco, two of the contestants almost tied and the third showed up very well. **John W. Hart** won the election with a vote of 1,281, only 34 votes in excess of the number received by **Roland G. Swaffield**, incumbent. **C. Morton Booth**, also contesting, received 902 votes.

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By George Harnagel, Jr.



George Harnagel, Jr.

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* * *

"Human happiness depends more on a well-fed sense of importance than on a well-fed stomach, and a sense of importance can last an entire lifetime on a diet of illusions."—Mortimer Levitan in the *Journal of the ABA*.

* * *

"Frank Vincent, County Judge of Hanson County, relates an experience down in his county as follows: Our efficient County Assessor had a farmer list a valuable pure-bred bull, but listed no other cattle or cows, and so went out to see about it. The farmer's wife came to the door and he inquired, 'How many cattle do you have?' She replied, 'Just one, the bull.' He then asked if they had any cows and she told him 'no.' He then said that he had wondered about it and she replied, 'the bull has been wondering about it too.'"—*South Dakota Bar Journal*.

* * *

The board of governors of the State Bar of **Oregon** has declined as a matter of general policy the request of the attorney-general of that state that the Board supply him with "a confidential list of the best qualified and experienced attorneys in the field of criminal prosecution." The request was made in connection with the prosecution of indictments returned in Multnomah County following an investigation by the attorney-general of vice and corruption charges.

LETTERS TO THE EDITOR

Dear Sir :

Mr. Dooley's "Journal of Discovery" in the July issue of the BAR BULLETIN, while amusing and cleverly done, was, I believe considerably out of place in that publication. From the characterization of "judicial gobbley-dook" to the suggestion that "thim Judges . . . don't quit often enough," the piece is nothing less than an attack, albeit a light handed one, by means of ridicule and contempt, on the highest judicial tribunal of this country.

Considerable non-constructive criticism has been directed against the Court recently. Many leading members of the Bar have decried this, some doing so in spite of basic disagreement as to the correctness of recent court decisions. One need not agree with the Court's application of the law, to render it and its Justices the respect and restraint to which they are entitled.

Even more important, it has been pointed out that destructive criticism, while to be deplored from any source, is particularly undesirable coming from an attorney or group of attorneys. Disrespect for the Supreme Court, or for its Justices, is not to be distinguished, in the public mind, from disrespect for other appellate courts, for the trial courts, or for the entire profession for that matter. If only from the point of view of public relations, one would not expect an organized Bar Association to contribute to the present public disaffection.

Yours very truly,

/s/ Robert H. Powsner

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